



New FIRE model legislation takes on DEI bureaucracy's chilling effect on campus

by [FIRE](#) February 16, 2023

FIRE has [criticized](#) the ever-increasing [bureaucratization](#) of our nation's colleges [for years](#). As Greg Lukianoff and Adam Goldstein [put it](#) a few years back: "The further a university drifts from its academic purpose, the less committed it will be to academic freedom."

Having spent more than two decades defending free speech and academic freedom on campus, FIRE knows too well just how true that is. When colleges act more like giant corporations and less like educational institutions, student and faculty rights suffer. Newly hired bureaucrats need to justify their paychecks, after all – so controversial, dissenting, or simply unpopular voices become targets. "Surely massive administrative bureaucracies of student life must be maintained," [wrote](#) FIRE co-founder Harvey Silverglate in 2011, "if universities are going to enforce the increasingly ubiquitous – in academia – 'right' not to be offended."

In recent years, campus administrative growth has focused on diversity, equity, and inclusion efforts. Whatever the intentions, the imposition of DEI bureaucracy upon the academy has too often come at the expense of academic freedom and freedom of expression. DEI administrators have been responsible for repeated campus rights abuses.

In one prominent recent example of many, Hamline University [declined](#) to renew an art history instructor's contract because she displayed medieval artwork depicting the Prophet Muhammad in her class. After a student complained, despite multiple warnings that the image would be displayed, Hamline's president and vice president of inclusive excellence [released](#) a statement claiming that respect for Muslim students in the class should have "superseded academic freedom."

Hamline's reaction was not an anomaly. American University's Office of Equity & Title IX [investigated](#) pro-choice law students after they disagreed with a religious student about the leaked *Dobbs* decision. And at Claremont McKenna College, the associate vice president for diversity [told a professor](#) that it was unacceptable to mention a racial slur after he played a recording of the Civil Rights Movement-era poem, "For the Union Dead." These offices even take aim at professors *pursuing* diversity, equity, and inclusion. Rhode Island University fired a professor after he [issued](#) a report criticizing the university's DEI office for failing to meet its stated goals and perpetuating a culture of racism.

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DEI efforts have threatened student and faculty rights in other ways, too. Most significantly, colleges and universities now routinely require students and faculty to pledge their allegiance to a politicized understanding of “diversity” as a condition of consideration for admission, hiring, or promotion. FIRE has repeatedly come to the defense of faculty who have been pressured into proving their fealty to a specific conception of DEI as the price of serious consideration or continued employment. And we’ve heard concerns about the chilling, coercive effect of mandatory diversity statements from hundreds more.

Indeed, faculty members are all too aware that DEI statements function as political litmus tests. A forthcoming FIRE report on free expression and academic freedom asked 1,491 professors directly if they think DEI statements are political litmus tests. Regardless of their political views, half of the professors surveyed indicated they believe DEI statements are an ideological litmus test that violate academic freedom. That number even includes roughly a quarter (26%) of left-leaning professors who, because they tend to agree with DEI statements, could be most expected to disagree that they are political litmus tests. 90% of conservative faculty and 56% of moderate faculty see them as political litmus tests.

The problem is growing. In a 2022 report published by the AAUP, 21.5% of surveyed universities indicated they now include DEI criteria in their tenure standards, and an additional 38.9% have it under consideration. In other words, 60% of institutions either include or are considering including DEI criteria in tenure standards. At bigger institutions, the numbers are even higher: 45.6% of large universities include DEI criteria in tenure standards, and an additional 35.5% have it under consideration. In sum, 81% of large universities either include or are considering including DEI criteria in tenure standards.

Providing the “wrong” answer dooms applications and candidacies. At the University of California, Santa Cruz, for example, DEI statements are used as an initial screening tool for applicants, with one public report indicating that 45% of applicants across various searches were eliminated in a first round of DEI statement screening. (That number may be comparatively low. During one department’s hiring process at the University of California, Berkeley, reviewing diversity statements prior to the rest of a candidate’s application eliminated 78% of applicants.)

Another forthcoming study from FIRE’s Nathan Honeycutt found that DEI statements focused on discussing efforts related to viewpoint diversity were severely penalized in comparison to statements that discussed race/ethnicity and gender. Additionally, statements that discussed rural diversity or socioeconomic diversity were also penalized. And some of these penalties are far from benign. For example, when faculty rated and evaluated a viewpoint diversity DEI statement, 52% of faculty who rated and evaluated this statement recommended that the applicant should *not* be advanced for further review, regardless of the applicant’s strengths, proficiencies, or laudable accomplishments related to teaching or research.

FIRE warned in a statement last year that the First Amendment “prohibits public universities from compelling faculty to assent to specific ideological views or to embed those views in academic activities.” But colleges have not stopped imposing political litmus tests on students and faculty in the guise of furthering DEI efforts.

So today, FIRE is introducing model legislation that prohibits the use of political litmus tests in college admissions, hiring, and promotion decisions. Legislation is strong medicine, but our work demonstrates the seriousness of the threat. While the current threat involves coercion to support DEI ideology, efforts to coerce opposition to DEI ideology would be just as objectionable. Attempts to require fealty to any given ideology or political commitment – whether “patriotism” or “social justice” – must be likewise rejected.

To that end, because we are cognizant of the endless swing of the partisan pendulum, FIRE’s legislative approach bans all loyalty oaths and litmus tests, without regard to viewpoint or ideology. In an effort to avoid exchanging one set of constitutional problems for another, our model legislation prohibits demanding support for or opposition to a particular political or ideological view. We believe this approach is constitutionally sound and most broadly protective of student and faculty rights, both now and in the future.

FIRE strongly believes that loyalty oaths and political litmus tests have no place in our nation’s public universities. Given the pernicious threat to freedom of conscience and academic freedom we have seen on campus after campus over the past several years, legislative remedies are worthy of thoughtful consideration. We look forward to further discussion with both supporters and critics about how best to ensure that our nation’s public colleges and universities remain the havens for intellectual freedom they must be.

Model Intellectual Freedom Protection Act

WHEREAS in 1957’s *Sweezy v. New Hampshire*, the Supreme Court of the United States observed that “[t]he essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.”; and

WHEREAS ten years later in *Keyishian v. Board of Regents*, the Supreme Court further declared that academic freedom “is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”; and

WHEREAS in *Healy v. James*, the Supreme Court stated that “the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”; and

WHEREAS in *West Virginia State Board of Education v. Barnette*, the Supreme Court held that the First Amendment prohibits the government from compelling an individual to engage in speech, proclaiming that “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”; and

WHEREAS many colleges and universities require or invite current and/or prospective faculty to demonstrate their commitment to diversity, equity, and inclusion (DEI), often through a written statement that factors into hiring, reappointment, evaluation, promotion, or tenure decisions; and

WHEREAS vague or ideologically motivated DEI statement policies can too easily function as litmus tests for adherence to prevailing ideological views on DEI, penalize faculty or applicants for holding dissenting opinions on matters of public concern, and, as the Supreme Court warned against in *Keyishian*, “cast a pall of orthodoxy” over our public college and university campuses; and

WHEREAS a survey by the American Association of University Professors of hundreds of colleges and universities found that more than one-fifth of higher education institutions include DEI criteria in tenure standards, and of the institutions that do not include tenure standards, nearly half indicated they are considering adding such criteria in the future; and

WHEREAS a survey by the American Enterprise Institute of academic job postings found that nearly 20 percent required DEI statements; and

WHEREAS according to data presented at an academic conference in 2022 at the University of Southern California, a majority of tenured/tenure-track faculty members surveyed in a study indicated that they disfavored a candidate for an academic position when the applicant’s DEI statement didn’t reference race/ethnicity and gender diversity, reflecting the fact that DEI statements are used to favor candidates who endorse prevailing campus ideological orthodoxies; and

WHEREAS according to a forthcoming FIRE survey, faculty are split evenly on whether DEI statements are a justifiable requirement for a university job (50%) or are an ideological litmus test that violates academic freedom (50%), and three-in-four liberal faculty support mandatory diversity statements while 90% of conservative faculty and 56% of moderate faculty see them as political litmus tests; and

WHEREAS the First Amendment to the United States Constitution prohibits public universities from compelling faculty to assent to specific ideological views;

Now, therefore, the State of ___ enacts the following:

A. No public institution of higher education shall condition admission or benefits to an applicant for admission, or hiring, reappointment, or promotion to a faculty member, on the applicant's or faculty member's pledging allegiance to or making a statement of personal support for or opposition to any political ideology or movement, including a pledge or statement regarding diversity, equity, inclusion, patriotism, or related topics, nor shall any institution request or require any such pledge or statement from an applicant or faculty member.

B. If a public institution of higher education receives a pledge or statement describing a commitment to any particular political ideology or movement, including a pledge or statement regarding diversity, equity, inclusion, patriotism, or related topics, it may not grant or deny admission or benefits to a student, or hiring, reappointment, or promotion to a faculty member, on the basis of the viewpoints expressed in the pledge or statement.

C. Nothing in this Act prohibits an institution from requiring a student, professor, or employee to comply with federal or state law, including anti-discrimination laws, or from taking action against a student, professor, or employee for violations of federal or state law.

D. Nothing in this Act shall be construed to limit or restrict the academic freedom of faculty or to prevent faculty members from teaching, researching, or writing publications about diversity, equity, inclusion, patriotism, or other topics.

E. Nothing in this Act prohibits an institution from considering, in good faith, a candidate's scholarship, teaching, or subject-matter expertise in their given academic field.

F. Each public institution of higher education in the state shall post and make publicly available all training materials used for students, faculty, and staff, on all matters of nondiscrimination, diversity, equity, inclusion, race, ethnicity, sex, or bias, and all of its policies and guidance on these issues, on its website.

G. A person whose rights were violated through a violation of this act may bring an action against a public institution of higher education, and its agents acting within their official capacities, in a state or federal court of competent jurisdiction to receive declaratory relief or enjoin a violation of this Act. If a court finds a violation of this act, the court shall provide a prevailing plaintiff appropriate equitable remedies, and award damages, reasonable court costs, and attorney's fees.

H. The Attorney General may file suit to enjoin a policy or practice prohibited by Section A or Section B.

I. If an institution, or any of its employees acting in their official capacities, are found by a court or the institution to have violated this Act, the institution may take disciplinary action against the responsible employees in accordance with the institution's policies and procedures.

J. In addition to any relief under Sections G and H, the [State Fiscal Officer] shall impose an administrative penalty of \$100,000 against a State Education Institution for each violation of this Act. The penalty shall be deposited in the [State Treasury] and shall be allocated to each State Education Institution that is not currently in violation of this Act and has not violated this Act within the preceding two fiscal years.

K. Any action brought pursuant to Section G must be brought within 1 year of the latest date the Act is alleged to have been violated.

L. If any provision of this chapter, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this chapter and the application of its provisions to any other person or circumstance shall not be affected thereby.

FIRE proposes alternative formulations of an enforcement provision for consideration:

Alternative A

In addition to any relief under Sections G and H, the [State Fiscal Officer] shall impose an administrative penalty of \$30 per student enrolled at the institution on a full-time basis in the fiscal year preceding the violation, against a State Education Institution for each violation of this Act. The penalty shall be deposited in the [State Treasury] and shall be allocated to each State Education Institution that is not currently in violation of this Act and has not violated this Act within the preceding two fiscal years.

Alternative B

In addition to any relief under Sections G and H, the [State Fiscal Officer] shall impose an administrative penalty of the lessor of \$300,000 or 1% of the State Education Institution's budget during the fiscal year preceding the violation, against a State Education Institution for each violation of this Act. The penalty shall be deposited in the [State Treasury] and shall be allocated to each State Education Institution that is not currently in violation of this Act and has not violated this Act within the preceding two fiscal years

